IN THE IOWA SUPREME COURT

PLANNED PARENTHOOD OF THE HEARTLAND AND JILL MEADOWS, M.D., Petitioners-Appellants, v. TERRY BRANSTAD EX REL. STATE OF IOWA AND IOWA BOARD OF MEDICINE, Respondents-Appellees.	SUPREME COURT NO. 17-0708 POLK CO. NO. EQCE081503 **PETITIONERS'-APPELLANTS' REPLY BRIEF**

COME NOW Petitioners-Appellants, by and through their undersigned attorneys, and pursuant to Iowa R. App. Pro. 6.1002(2), respectfully submit this Reply brief in further support of their Application for Interlocutory Appeal and Motion for a Temporary Injunction.

1. Respondents-Appellees first challenge this Court's ability to grant Petitioners'-Appellants' request for an injunction pursuant to Iowa Rule of Civil Procedure 1.1506(2), but can point to no caselaw to support

their argument that Petitioners-Appellants cannot seek a temporary injunction from this Court simply because they initially sought relief from the district court. See Resistance to Pet.-Apps.' Mot. for Temp. Inj. & App. for Interlocutory Appeal ¶ 8 ("Resistance"). Indeed, Rule 1.1506 contemplates that temporary injunctions can be granted by a judge of the district court and a justice of the supreme court. And, Rule 1.1504 expressly contemplates a subsequent request to a higher or different court, providing that "[a] petition seeking a temporary injunction shall state, or the attorney shall certify thereon, whether a petition for the same relief, or part thereof, has been previously presented to and refused by any court or justice, and if so, by whom and when."

2. Moreover, a temporary injunction is an exercise of the Court's inherent equitable authority to protect the legal rights of the parties in the absence of an adequate legal remedy. Max 100 L.C. v. Iowa Realty Co., 621 N.W.2d 178, 181 (Iowa 2001). See also Manning v. Poling, 83 N.W. 895, 897 (1900) on reh'g, 86 N.W. 30 (1901) and overruled on other grounds by Peoples Trust & Savings Bank v. Sec. Savings Bank, 815 N.W.2d 744 (Iowa 2012) ("a provisional injunction during the pendency of the suit may be

necessary for the purposes of justice" especially where "[a]n injunction may be the very object of the suit,—the final decree sought.").

3. Respondents also argue that this Court should not issue a temporary injunction because "whether the informed consent requirement constitutes an undue burden" is a "question of law that is very much in dispute." Resistance ¶¶ 11–12. But this Court has already recognized that an abortion restriction that constitutes an undue burden is unconstitutional. Planned Parenthood of the Heartland, Inc. v. Iowa Bd. of Med., 865 N.W.2d 252, 263 (Iowa 2015). (Indeed, this Court also granted a stay in that case before fully reaching the merits, indicating that the undue burden standard, as a minimum standard, is *not* "very much in dispute." See Order Granting Motion for Stay, Planned Parenthood of the Heartland, Inc., 865 N.W.2d 252, No. 14-1415 (Sept. 16, 2014). Finally, as set forth in Petitioners'-Appellants' Brief in Support of Application for Interlocutory Appeal and Motion for a Temporary Injunction ("T.I. Brief"), whether a particular abortion restriction constitutes an undue burden is not a pure question of law, but is rather context-specific and based on the evidence and record in the case. T.I. Brief 46-50; see also Planned Parenthood of the Heartland,

Inc., 865 N.W.2d 252 at 268–69.

4. Under Respondents' theory, no unprecedented abortion restriction—no matter the effect it had on women's access—could ever be temporarily enjoined. Here, because Petitioners-Appellants have demonstrated that they are likely to succeed on their claim that the mandatory delay and additional trip requirements constitute an undue burden, based on the evidence in the record in this case, a temporary injunction is warranted.

5. Petitioners-Appellants' interlocutory appeal should also be granted because "the likely benefit to be derived from early appellate review"—namely, preventing immediate and substantial harm to Petitioners-Appellants and their patients as described in Petitioners-Appellants' opening brief and below—"outweighs the likely detriment" to Respondents-Appellees of being prevented from enforcing an unconstitutional statute. River Excursions, Inc. v. City of Davenport, 359 N.W.2d 475, 478 (Iowa 1984). This Court has granted interlocutory appeals where "it is desirable that an early and final resolution of [the] matter be made," In Interest of Long, 313 N.W.2d 473, 477 (Iowa 1981), and where "the interest of sound

and efficient judicial administration" will be served because "the appeal will involve a pretrial determination of a controlling issue of law" which "will materially advance the progress of the litigation," Banco Mortg. Co. v. Steil, 351 N.W.2d 784, 787 (Iowa 1984). That is the case here.

Petitioners-Appellants Have Established That the Act Will Impose Irreparable Harm.

6. As in initial matter, Respondents-Appellees misleadingly state that the Act does not "impose any obligation on women who seek abortions." See Resistance ¶ 2. The Act plainly requires that women seeking abortions make an additional, and medically unnecessary trip to the health center, and then requires women to wait at least 72 hours before they can return to the health center to have an abortion. S.F. 471 § 1 (2017) (to be codified at Iowa Code § 146A.1(1)).

7. Contrary to Respondents'-Appellees' arguments, Petitioners-Appellants have established through uncontroverted fact and expert testimony that, absent an injunction, Petitioners-Appellants and their patients will face irreparable harm. These harms are concrete and real. Specifically, as set forth in Petitioners-Appellants' opening brief, laws similar to the Act have been shown to delay women an average of eight days, and some

women longer, because both women and providers have other scheduling constraints. T.I. Brief 25 n.7 (Grossman Aff. ¶ 37).[1] This delay, in turn, will expose them to increased health risks. Id. at 25–26. Moreover, in Iowa, a significant number of women have an abortion one to two weeks before the gestational age cut-offs both for medication abortion and for surgical abortion, which demonstrates that timely access to abortion is critical. (See Meadows Aff. ¶¶ 18, 24).

8. In addition, over fifty percent of Petitioners'-Appellants' patients are at or below 110% of the federal poverty line (meaning, e.g., they make $13,068 or less if single or $17,622 if supporting a child). (Id. ¶ 16). These women already face practical difficulties accessing care. Fact and

[1] As this Court and other courts have recognized, these other constraints must be taken into account when determining how a new restriction will affect women. See, e.g., Planned Parenthood of the Heartland, 865 N.W.2d at 268 (noting, before rejecting, state's hypothetical assertion that "[i]f Planned Parenthood could deploy physicians in more communities, its clients would not have to travel as far"); Planned Parenthood Ariz., Inc. v. Humble, 753 F.3d 905, 915-16 (9th Cir. 2014) (considering likelihood that challenged restriction would make it impossible for Planned Parenthood to operate one of its rural health centers); Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health, 1:16-cv-01809-TWP-DML, 2017 WL 1197308, at *8 (S.D. Ind. March 31, 2017) ("[T]he undue burden inquiry does not contemplate re-examining every pre-existing policy or practice of abortion providers to see if they could further mitigate burdens imposed by a new abortion regulation.").

expert testimony in the record also establish that the Act's extreme mandatory delay and additional trip requirement will significantly compound these obstacles by requiring women to delay their procedure, take far more time off from school, work, and/or away from home, lose wages, and/or have to pay for child-care, and expend additional travel costs—all of which will be very difficult for many women, and will cause added delay, especially those who are low-income. (See Ex. 3, T.I. Brief, Aff. of Jane Collins, Ph.D. ¶¶ 9, 21–52 ("Collins Aff."); Meadows Aff. ¶ 16). For some low-income women, these burdens will be prohibitive. (Collins Aff. ¶¶ 7–9). For others, it will cause an economic shock to them and their family and force them to skimp on other basic necessities. (Id. ¶ 9).

9. The uncontroverted testimony also demonstrates that the Act will be particularly harmful for women who are the victims of rape, abuse, and/or intimate partner violence, as well as women seeking to terminate a wanted pregnancy due to a fetal anomaly. (See Meadows Aff. ¶¶ 29–30, Grossman Aff. ¶ 47–48, Walker Aff. ¶¶ 18–29). See also Planned Parenthood of the Heartland, 865 N.W.2d at 267 (recognizing harms imposed by law that required increased travel distances and an additional

trip to a clinic).

10. In addition to all this evidence, there is now evidence of the harms the Act imposed last week when it was briefly in effect. The attached Affidavit of Jason Burkhiser Reynolds, a health center manager for PPH, explains how in the days leading up to the Governor signing the Act into law and during the short time the Act was in effect on Friday, May 5, the Act wreaked havoc on the lives of Petitioners'-Appellants' patients who were scheduled to have their abortion that day. (See generally Aff. of Jason Burkhiser Reynolds in Supp. of Pets.'-Appellants' Mot. for T.I. ("Burkhiser Reynolds Aff.")). Women, some of whom had travelled for hours (including one who had traveled seven hours), were extremely distraught when they learned that they could not have their abortion because this Court's stay had not yet been entered. (Id. ¶¶ 2–6). Some women left the clinic before the Act was stayed, and were unable to come back to the clinic that day for their abortion. (Id. ¶ 7). Women who have procedures scheduled for this week do not yet know whether they will be able to proceed with treatment on the day of their visit. (Id. ¶ 17).

11. The patients Mr. Reynolds describes include low-income

women struggling to pay for basic necessities, women caring for large families, women working multiple jobs with very limited time off, women with limited transportation, rape victims anxious to terminate their pregnancy as soon as possible, women with health problems, and a woman terminating for a fetal anomaly who had already had multiple ultrasounds. (Id. ¶¶ 9–10, 12–15).[2]

12. These significant, irreparable harms occurred while the Act was in effect for less than two hours. Without an injunction from this Court, many more women like those that were harmed on Friday while the Act was in effect, will continue to be harmed. As explained in Petitioners'-Appellants' opening brief, these harms are more than sufficient to meet the standard for temporary injunctive relief. T.I. Brief 57–59; see also Order Granting Motion for Stay, Planned Parenthood of the Heartland, Inc., 865 N.W.2d 252, No. 14-1415 (Sept. 16, 2014) (granting stay of abortion restriction pending appeal).

[2] Respondents-Appellees trivialize these burdens and the harm the Act will impose by suggesting that Petitioners-Appellees are arguing for a right to "abortion on demand," Resistance ¶ 19. Petitioners-Appellants are asking for this Court to protect their patients' well-established right not to be unconstitutionally burdened by the State in accessing abortion as a result of the Act's extreme mandatory delay and additional trip requirement.

Petitioners-Appellants Are Likely to Succeed in Demonstrating That the Act is Unconstitutional.

13. Petitioners-Appellants have also demonstrated that they are likely to succeed in demonstrating that the Act violates their patients' due process rights, under both strict scrutiny as well as an undue burden test similar to or based on the federal standard, and that the Act violates their patients' equal protection rights under heightened scrutiny. T.I. Brief 34–56.

14. Respondents-Appellees do not even attempt to address Petitioners'-Appellants' arguments that abortion is a fundamental right protected by strict or other heightened scrutiny. They also do not attempt to argue that their interest in potential life is "compelling" or "important" so as to satisfy a heightened scrutiny standard, instead defending their interest as "legitimate." Resistance ¶ 1. Nor does the Resistance rebut Petitioners'-Appellants' evidence that the Act will seriously harm women or present any evidence that the Act actually *advances* their asserted interest in potential life. Instead, Respondents-Appellees: 1) rest on the general presumption that statutes are constitutional; 2) rely entirely on an unsupported reading of Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992); and 3) ignore Petitioners'-Appellants' equal protection claim, which

is separate and distinct from Casey's "undue burden" test.

15. Although, as a general matter, "a strong presumption of validity protects statutes from constitutional challenges," Resistance ¶ 13 (citing Miller v. Iowa Real Estate Commission 274 N.W.2d 288, 291 (Iowa 1979)), this Court more recently stressed that this review must be "meaningful" and not "toothless," even at its most deferential. Varnum v. Brien, 763 N.W.2d 862, 879 (Iowa 2009) (citing *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 9 (Iowa 2004)). Moreover, where a restriction is subject to heightened scrutiny, as Petitioners-Appellants have explained is the case here, T.I. Brief 53–55, the burden falls on the state to provide an "exceedingly persuasive," evidence-based justification for that restriction, Varnum, 763 N.W.2d at 897 (quoting *U.S. v. Virginia*, 518 U.S. 515, 532–33 (1996) (internal quotation marks omitted)), which Respondents-Appellees have not even attempted to do here.

16. Respondents'-Appellees' principal argument in support of the Act is that the U.S. Supreme Court in Casey upheld an informed consent requirement with a waiting period one-third of the delay mandated by the Act. Resistance ¶ 23. Based on this, they claim that the Act must be

sustained under the Iowa Constitution because the state has a legitimate interest in protecting potential life. Id. at ¶ 24; see also id. ¶¶ 2–3 ("[T]he State is able to promote from the outset of the pregnancy its recognized interests in protecting the health of the woman and the life of the unborn child.")

17. However, no federal or state court has ever upheld *any* 72-hour mandatory delay requirement, let alone one that mandates an additional medically unnecessary trip to the clinic, as the Act does. And *Casey*, which affirmed a 24-hour requirement in a state with 81 providers, was limited on its face to the very different record before that Court, see T.I. Br. 49–52.

18. As Respondents properly recognized in their brief to the district court, moreover, the undue burden standard is not simply a "rational basis" test but further requires "the Court '[to] weigh the extent of the burden against the strength of the state's justification in the context of each individual statute or regulation." Respondents' Resistance to Pets.' Mot. for Temporary Inj. Relief & Supp. Br. 7 (quoting Planned Parenthood of the Heartland, 865 N.W.2d at 263 (quoting Humble, 753 F.3d at 914)). Even more recently, the U.S. Supreme Court in Whole Woman's Health v.

Hellerstedt stressed that the undue burden standard requires a court to balance "the burdens a law imposes on abortion access together with the benefits those laws confer," 136 S. Ct. 2292, 2309 (2016); see also T.I. Brief 44 (citing additional federal court decisions properly applying a balancing standard even where state's asserted interest is fetal life).

19. "There is no question the [Act] imposes some burdens that would not otherwise exist and did not exist before the [Act] was adopted," Planned Parenthood of the Heartland, 865 N.W.2d at 267, which Respondents-Appellees do not appear to contest, and the record *in this case* demonstrates that these burdens are serious. See T.I. Brief 23–31. Moreover, Respondents-Appellees provide zero evidence to support altering the existing regulatory system, which already requires that women receive an ultrasound and that a physician obtain informed consent prior to a woman having an abortion, to mandate the Act's extreme mandatory delay and additional trip requirements. Nor has the State presented any evidence that the Act will further the State's interests; indeed, Petitioners-Appellants have provided evidence that the Act will do just the opposite. (Grossman Aff. ¶¶ 24–34; Meadows Aff. ¶¶ 7–12, 33).

20. For all the reasons above, and as explained further in Petitioners'-Appellants' opening brief, Petitioners-Appellants have established that the Act both imposes an undue burden and fails strict or other heightened scrutiny.

Respondents-Appellees Will Not Be Harmed by a Continuation of the Temporary Injunction Now in Place.

21. Respondents-Appellees do not assert that they will be harmed by a continuation of the temporary injunction, and instead assert that it is "unfair" for Respondent-Appellees to have to provide evidence "in such a compressed time frame" that they will be harmed by a temporary injunction. Resistance ¶¶ 27–29. Any unfairness due to the compressed time frame on which the litigation has proceeded is due to the emergency effective date given by the Iowa legislature; Petitioners-Appellants filed this case less than 24 hours after learning the Governor intended to sign the Act into law on May 5.

22. Moreover, Respondents-Appellees cannot demonstrate that a temporary injunction to maintain the status quo will harm the State, given that current law already requires that women seeking an abortion obtain an ultrasound and give informed consent prior to having an abortion and given

that the State has not produced any evidence that these requirements are insufficient. Finally, the lack of harm to the state is all the more apparent given that, despite the Act's immediate effective date, it requires PPH to distribute and comply with state materials and state regulations that have not even been published or promulgated, despite the state's assurance that they would be produced by the time the Act was signed at the district court below, see T.I. Brief 21–22 & n.5.

Respectfully submitted,

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*Application for admission *pro hac vice* pending
**Application for admission *pro hac vice* forthcoming